

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**FILED  
CLERK  
4/28/2014**

**U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE**

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:  
ALLSTATE INSURANCE COMPANY, :  
et al., : 13-CV-5830 (JFB) (AKT)  
Plaintiff, :  
: April 2, 2014  
: V. : Central Islip, NY  
: :  
DAVID ZELEFSKY, M.D., et al., :  
: :  
Defendant. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: RICHARD KING, ESQ.  
NATHAN TILDEN, ESQ.

For the Defendant: E. CHRISTOPHER MURRAY, ESQ.  
ANTHONY LICATESI, ESQ.

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1 THE CLERK: Calling case 13-CV-5830,  
2 Allstate v. Zelefsky.

3 Please state your appearance for the record.

4 MR. KING: Good afternoon, your Honor.  
5 Richard King on behalf of the plaintiffs, from the law  
6 firm Smith & Brink, Garden City, New York.

7 MR. TILDEN: Good afternoon, your Honor.  
8 Nathan Tilden, also on behalf of Allstate.

9 MR. MURRAY: E. Christopher Murray from  
10 Ruskin Moscou Faltischek, on behalf of defendants Luz  
11 Bazakos, Olga Gazonas, North Central Leasing and  
12 Astoria Leasing.

13 MR. LICATESI: Good afternoon, Judge.  
14 Anthony Licatesi from Rubin & Licatesi. I represent  
15 Dr. David Zelefsky, New York Rehab, Pain Management &  
16 Medical Services, P.C.

17 THE COURT: Good afternoon, everybody. As  
18 you know, we're here for argument on the pending  
19 motions to dismiss. I have reviewed the papers, so you  
20 don't have to start from scratch. You can highlight  
21 anything you'd like to highlight from your papers and I  
22 may have some questions for you.

23 It's the defendants' motion, so I don't care  
24 who goes first.

25 MR. MURRAY: Good afternoon, your Honor.

1 THE COURT: Good afternoon.

2 MR. MURRAY: Ruskin Moscou represents what  
3 we've been calling the leasing defendants, which are  
4 Luz Bazakos, Olga Gazonas, North Central Leasing  
5 Company and Astoria Leasing Co.

6 The essence of the claim, the RICO claim  
7 against the leasing defendants are that they were --  
8 are principals or owners of New York Rehab, a medical  
9 professional corporation, and by being so, there's a  
10 violation of New York State law, a violation of New  
11 York State's Business Corporation Law, and that the --  
12 as a result, the sending of any invoices or demands for  
13 payments to Allstate on no-fault claims are fraudulent.

14 In order for them -- Allstate to allege a  
15 claim against the leasing defendants, they first must  
16 at least allege sufficient facts that would demonstrate  
17 that the leasing defendants are in fact undisclosed  
18 principals or owners of the professional corporation.  
19 Here, the complaint is woefully insufficient in  
20 alleging sufficient facts that would raise a RICO claim  
21 based on such an undisclosed ownership interest. In  
22 fact, the allegations of -- the few factual allegations  
23 of the complaint cut against or refute any claim that  
24 the leasing defendants are owners in the P.C.

25 The fundamental indices of ownership of an

1 entity is that the party shares the risk of loss or the  
2 benefit of profits, that the risk is shared by the  
3 party that's claimed to be an owner. The allegations  
4 here -- the only factual allegations against the  
5 leasing defendants are that they entered into two  
6 leases with the P.C. and that the price paid or the  
7 rent paid under those leases was excessive. There's no  
8 allegation in the complaint that the amount of money  
9 being paid to the leasing defendants was in any way,  
10 shape or form dependent on the profitability of the  
11 P.C.

12           There's \$25,000 that was paid per month  
13 under the two leases, which is alleged. There's no  
14 allegations whatsoever that that amount varied,  
15 fluctuated in any way, shape or form, so that if the  
16 P.C. made twenty million dollars one year, they still  
17 received \$25,000 a month under the lease payment. If  
18 the P.C. lost ten million dollars in one year, they  
19 would still receive \$25,000 a month under the lease.

20           There's no allegations in the complaint that  
21 my clients shared in any of the risk of the profit or  
22 loss of the P.C. I think in and of itself, that  
23 refutes any claim that they have an ownership interest.  
24 This does not even go to the fact that they  
25 misrepresent the terms of the lease in the complaint,

1 as opposed to what the lease actually provides. But  
2 even if we just ignore that and just took their  
3 allegations, their allegations do not rise to the level  
4 of showing an ownership interest because there's no  
5 risk being borne by my client.

6 In addition, there are no allegations in the  
7 complaint that my clients directed medical services,  
8 made business decisions, engaged in any type of  
9 decisions about what type of business they should be  
10 in, what type of billing they should do, what type of  
11 operations whatsoever, nothing whatsoever. There are  
12 vacuous, conclusory statements that my clients  
13 "participated in the P.C.," but there are actually no  
14 facts alleged that would support that allegation.

15 Under Iqbal and the Supreme Court's ruling  
16 on a motion to dismiss, the complaint has to set forth  
17 some facts which would, if proven, establish a  
18 plausible claim. Here, there's no facts alleged. It's  
19 just completely vacuous, other than the allegation that  
20 they entered into two leases and the amount paid under  
21 those leases was excessive. That in and of itself does  
22 not establish an undisclosed ownership interest or a  
23 violation of the Business Corporation Law. There's  
24 just no there there with regard to the leasing  
25 defendants.

1           The allegations in the complaint with regard  
2 to the leasing defendants go through paragraph 79 of  
3 the complaint. Those allegations, most of them recite  
4 statutory language and recite Monell, the case history.  
5 Then when you go to the actual factual allegations  
6 regarding the leasing defendants, it's just the plain  
7 language and then the allegations regarding the two  
8 leases. That's it.

9           There's no request on behalf of the  
10 plaintiffs to replead and there's been no showing that  
11 they could plead additional facts. So I think with  
12 regard to the leasing defendants, the complaint is  
13 insufficient to raise any claim that they're an owner  
14 of the P.C. beyond what's called mere speculation.

15           THE COURT: Let me ask you a couple  
16 questions. First, I understand obviously that sharing  
17 in the risks would certainly be evidence of ownership,  
18 of an undisclosed principal's ownership, but what case  
19 says that even if there's other indicia of such control  
20 or ownership, that that's dispositive, that if you're  
21 not sharing in the risks, that you can't possibly be an  
22 owner? Which case stands for that proposition?

23           MR. MURRAY: We cited a few cases where they  
24 talk about that being the principle in our reply brief.

25           THE COURT: Those cases -- I'll look at them

1 but do they say that that's required or that's --

2 MR. MURRAY: It says it's the primary focus.  
3 They don't say that -- they basically say that  
4 ownership interest is someone that shares the profits  
5 or the losses.

6 THE COURT: They clearly allege -- there are  
7 multiple paragraphs where they allege that they're  
8 sharing in the profits. They just don't allege that  
9 they're sharing any losses, right?

10 MR. MURRAY: They don't allege that they're  
11 sharing the profits. Actually, they don't. They say  
12 that they're funneling fees. They don't have any facts  
13 to support it. Plus, they don't allege anything else.  
14 Even if the sharing of the profits and the losses were  
15 just one element of ownership or control and they could  
16 allege other things, they don't allege anything else.  
17 They don't allege anything whatsoever. They just say  
18 they participated and they're the owner, and they just  
19 have these vacuous, conclusory statements.

20 They don't say the leasing defendants or a  
21 particular one engaged in specific business decisions  
22 or participated in the billing or provided services,  
23 medical services to the P.C. They don't do any of  
24 that. They don't give any substance whatsoever to  
25 their allegations. It's just this vacuous thing and

1     there's these two leases.

2                   THE COURT:   On this issue of the leases, I  
3     understand -- I'm going to ask them about this  
4     discrepancy between what they alleged and what the  
5     leases say.   But even accepting what the leases say, I  
6     guess I don't understand how that issue could be  
7     decided on a motion to dismiss.   How can you determine  
8     without knowing -- just because there's a larger number  
9     of pieces of equipment does not necessarily mean that  
10    it couldn't have been excessive, right?   How is that  
11    done on a motion to dismiss?

12                  MR. MURRAY:   Because they have an obligation  
13    to plead their case in order to -- to put specific  
14    facts in it.

15                  THE COURT:   They have.   They've pled that  
16    it's excessive, right?

17                  MR. MURRAY:   But they don't -- that's a  
18    conclusory statement.   It's to say, okay, the \$25,000 a  
19    month is excessive.   That's not a fact.   That's a  
20    conclusion.   If they wanted to say, this is the  
21    equipment, this is what the market rate is, this is  
22    what the lease is for -- if they wanted to actually  
23    build up some facts around it to support their claim  
24    that it's excessive, then they would be able -- they  
25    should do that, but they don't.   They just say the



1 \$25,000 is excessive. That's not a fact, that's a  
2 conclusion.

3 If you look at all their allegations in the  
4 complaint, they're all conclusions, they're not facts.  
5 There would be ways, if it was truly excessive -- they  
6 would say, okay, look, there's this amount of equipment  
7 that's being leased, here's fact that show that it's  
8 excessive. Then they say it's excessive. Then they've  
9 actually pled some facts to back up their claim. But  
10 they don't do that here. They just say it's excessive.  
11 It's a foregone conclusion.

12 And I think that's the problem with all  
13 their allegations in the complaint. They just come to  
14 a conclusion without giving any allegations fact. This  
15 is a RICO action against two leasing companies that is  
16 going to cost them large amounts of money to defend,  
17 and just speculating that because they entered into  
18 these two leases and we're saying it's excessive, we're  
19 able to drag them into a RICO action based solely on  
20 that, I think completely misses the mark -- is  
21 insufficient.

22 It's not a heightened pleading requirement  
23 but under Iqbal and other cases, there is a requirement  
24 to come forward with facts, not conclusions, and they  
25 don't allege facts.

1 THE COURT: Okay. Do you want to move to  
2 your other points?

3 MR. MURRAY: The requirement also with  
4 regard to a distinctive enterprise under a RICO-pled  
5 violation. Here, the allegation that New York Rehab  
6 was fraudulently incorporated and thus, that gives life  
7 to this RICO claim. In other words, the corporation,  
8 the enterprise is the RICO violation. The courts have  
9 held that that's not a distinctive enterprise. The  
10 enterprise that's being alleged cannot be the RICO  
11 violation.

12 The essence of the claim here is that the  
13 existence of the corporation gives rise to the fraud.  
14 So there's no distinctive enterprise which the  
15 individuals are participating in, separate and apart  
16 from the alleged RICO activity. That's a pleading  
17 deficiency. You're not supposed to -- in order to have  
18 a separate RICO enterprise, you have to have some  
19 entity that's been taken over or being used to  
20 perpetrate a fraud. The existence of the entity itself  
21 can't be the fraud, and that's what they allege here,  
22 that the Monell violations -- the very existence of New  
23 York Rehab is the fraud, so it's not a distinctive  
24 enterprise in order to plead a RICO violation.

25 THE COURT: Don't they allege all sorts of

1 mail fraud, though, independent of that?

2 MR. MURRAY: Not with regard to our clients.

3 THE COURT: Okay.

4 MR. MURRAY: With regard to the leasing  
5 defendants, there's no allegations that they  
6 participated -- again, they just lump all the  
7 defendants together but there's no allegation that our  
8 clients participated in any kind of mail fraud, in the  
9 sense of billing for services that weren't provided or  
10 mislabeling services or miscoding services. There's  
11 nothing in the complaint with regard to the leasing  
12 defendants that we participated or were involved in  
13 that.

14 Everything with regard to the leasing  
15 defendants goes to the Monell violation, the fraudulent  
16 incorporation of New York Rehab. They don't allege  
17 sufficient facts to support that claim. If they have  
18 additional facts they want to allege, then they should  
19 ask to replead and allege those facts in a complaint.

20 I think it's telling that in their  
21 memorandum of law in opposition to the motion to  
22 dismiss, they start to throw up anything, and half of  
23 what they threw up isn't contained in the complaint.  
24 They make allegations about them living together,  
25 things that they just kind of throw in there because

1 all that's here, all that's in the complaint is the two  
2 leases and a conclusory statement that the rent paid  
3 under those leases is excessive.

4 And based on that, they want to drag these  
5 four defendants into a RICO action and require them to  
6 expend tremendous amounts of money defending it based  
7 on a sole allegation of those two leases and according  
8 to them, the conclusory statement that those rental  
9 payments are excessive. It's just not sufficient to  
10 allege a RICO claim against my clients.

11 THE COURT: Okay, thank you.

12 Okay, you guys are up. Oh, I'm sorry, I  
13 forgot. Go ahead.

14 MR. LICATESI: Thank you, Judge.

15 Your Honor, I stand before this Court today  
16 playing the role of David versus Goliath. In order to  
17 properly analyze the instant action, I believe it's  
18 important to examine the legislative intent of New  
19 York's no-fault laws.

20 In the 1970's, in an effort to unclog and  
21 unburden our system of these less than serious injuries  
22 involving automobile accidents and in order to appease  
23 auto insurance lobbyists, our legislature enacted  
24 Section 5102 of the New York State Insurance Law,  
25 wherein an automobile accident victim could not sue

1 unless he or she sustained a serious injury, which they  
2 define as death, dismemberment, fractures, scarring or  
3 some sort of permanent partial disability.

4           The reason I bring this up is, in exchange  
5 for this law, your Honor, the no-fault laws were  
6 passed. The consumer advocates were up in arms and  
7 they said, if we lose our fundamental right to sue in a  
8 car accident case to unclog this system, which is an  
9 extreme benefit to the insurance companies at the time,  
10 what do the consumers get back?

11           And what the consumers and the assignees,  
12 the healthcare providers received was reimbursement of  
13 all reasonable and necessary healthcare claims as well  
14 as lost wages. The consumer advocates again were up in  
15 arms saying, wait a minute, we're dealing with  
16 insurance companies. They're not going to pay. They  
17 put teeth into that law and they put a very specific  
18 scheme, a regulatory way to get paid and very stiff  
19 penalties to the insurance companies for not paying.

20           You're supposed to pay those claims within  
21 thirty days. The statute says not to take an  
22 adversarial position. The statute says to cooperate.  
23 The statute says that the insurance company should pick  
24 up the telephone and clarify any disputes. It says  
25 that if they don't do that, that the penalties are 2% a

1 month plus legal fees for not properly paying those  
2 claims.

3           As expected, there was a drastic reduction  
4 in the amount of less than serious injury cases that  
5 were filed. However, the insurance companies did not  
6 anticipate the volume of the no-fault claims and the  
7 amount of money the no-fault insurance carriers would  
8 expend on the payment of those no-fault claims.

9           The volume of no-fault claims placed into  
10 arbitration and civil litigation have increased each  
11 and every year since the passage of the no-fault laws  
12 and the enactment of the no-fault statutory and  
13 regulatory scheme. As a result, the automobile  
14 insurance carriers were faced with increased  
15 expenditures and began paying more in no-fault claims  
16 than the previous bodily injury claims for less than  
17 serious injuries.

18           Hence, the insurance carriers have  
19 retaliated through a policy of claim avoidance and the  
20 increased filings of what's before this Court today,  
21 these RICO and Malella (ph) type of allegations.  
22 Paragraphs 36 through 44 of the Allstate complaint  
23 recite some of these applicable licensing statute and  
24 no-fault statutes. Additionally Allstate relies on the  
25 Malella case, alleging that it does not have to pay no-

1 fault claim when there is a fraudulent incorporation  
2 and operation and control of the medical P.C.

3 More specifically, Allstate argues by merely  
4 pleading facts, that it may be plausible that the lease  
5 rental agreements funneled money to Doctors Bazakos and  
6 Gazonas and that the excessive lease payments funneled  
7 profits from the professional corporation to North  
8 Central Leasing and Astoria Leasing.

9 Judge, I heard the questions and the feeling  
10 that I received is that the Court may believe that  
11 that's enough. But if you look at that pleading and  
12 you look at the facts, the first fact that jumps out is  
13 that there's a monthly payment of \$3,700, paid from  
14 North Central -- paid to North Central by New York  
15 Rehab. The second fact is that there's a monthly  
16 payment of \$21,500 to Astoria Leasing by New York  
17 Rehab.

18 But what's not a fact is paragraph 72, and  
19 we're bound by their pleading. Paragraph 72 of the  
20 complaint intentionally misrepresents to this Court  
21 that in exchange for monthly payments of \$21,500,  
22 Astoria Leasing provided one office chair, telephones,  
23 three computers, two printers, basic computer software,  
24 five air conditioners, filing cabinets, a coffee  
25 machine, basic office furniture, a vacuum cleaner, a

1 refrigerator and several medical devices. Nothing  
2 could be further from the truth.

3 And what's telling about that -- this  
4 unsubstantiated allegation based on an intentional  
5 mischaracterization summarizing the lease agreement is  
6 a crystal clear indication of Allstate's deficient  
7 pleading, which must be dismissed by this Court. There  
8 is also clear and convincing evidence of Allstate's  
9 true intentions, which is to abuse the federal courts  
10 by using a purported RICO and Malella claim as an  
11 economic sworn to economically cripple and eventually  
12 bankrupt my clients.

13 The facts of the Malella case established  
14 that it was multiple professional corporations, truly a  
15 doc in the box. Dr. Cohen had two dozen professional  
16 corporations that he rented his license to. He had no  
17 medical practice whatsoever, didn't engage in the  
18 practice of medicine or the medical control and  
19 operation of those practices.

20 In the instant case, Dr. Zelefsky is the  
21 sole shareholder of New York Rehab, as admitted by  
22 Allstate. He works five days a week at both locations.  
23 Allstate does not allege that Dr. Zelefsky is a doc in  
24 the box. Allstate does not specifically allege the  
25 facts that either Dr. Bazakos or Dr. Gazonas control



1 the medical practice. Allstate does not specifically  
2 allege the facts that either Dr. Gazonas or Dr. Bazakos  
3 operate the medical practice. Allstate does not  
4 specifically allege facts that either Dr. Bazakos or  
5 Dr. Gazonas fraudulently incorporated this medical  
6 practice. Allstate does not specifically allege facts  
7 that Dr. Bazakos or Dr. Gazonas financially invested in  
8 the medical practice. Allstate does not allege the  
9 existence of a management company. Allstate does not  
10 allege the existence of a marketing company.

11 Which brings me back full circle to the  
12 beginning of my argument, your Honor. Allstate is  
13 mischaracterizing two lease agreements as the only  
14 means of support for this RICO action.

15 The New York Court of Appeals specifically  
16 admonished against such conduct by no-fault insurance  
17 carriers, by stating in pertinent part in that holding,  
18 "The regulatory scheme [referring to the no-fault  
19 scheme], however, does not permit abuse of the truth-  
20 seeking opportunity that 11 NYC RR 65-3.16(a)(12)  
21 authorizes. Indeed, the superintendent's regulations  
22 themselves provide for agency oversight of carriers and  
23 demand that carriers delay the payment of claims to  
24 pursue investigations solely for good cause. In the  
25 licensing context, carriers will be unable to show good

1 cause unless they can demonstrate behavior tantamount  
2 to fraud." This pleading is completely deficient of  
3 any fraudulent allegations.

4 The Court should also be advised of how  
5 Allstate came into possession of the lease agreements.  
6 I voluntarily provided them these lease agreements. I  
7 had voluntarily provided the lease agreements to other  
8 major insurance carriers, none of which have taken any  
9 action against Dr. Zelefsky or NY Rehab.

10 Secondly and more importantly, Judge, I  
11 learned this early on in my career. It's what you  
12 don't see that sometimes it the most telling. What  
13 these plaintiffs did not provide was a copy of the  
14 lease agreement. They did not provide or annex the  
15 lease agreements with the fair market opinions from a  
16 prominent forensic expert certified as a public  
17 accountant and an expert in the healthcare field to  
18 this lawsuit.

19 Why were they hiding this? Why did this  
20 mischaracterize what's in the lease. Please look  
21 carefully at how badly Allstate mischaracterized the  
22 lease. The Court will see that the equipment includes  
23 at least 50 computers and corresponding licenses, 10  
24 hard drive, 22 printers, 17 copiers, 8 blood pressure  
25 machines, 21 physical therapy tables, 18 lockers, 13

1 curtain bays, over 40 items of medical equipment,  
2 including fluoroscopy machines, EEG, VNG machines,  
3 neurodiagnostic and range of motion equipment,  
4 electrical stimulation and physical therapy machines  
5 and numerous muscle strengthening apparatuses, as well  
6 as spinal traction devices.

7 Your Honor, I have with me color photos of  
8 the lease items that I would like to show the Judge  
9 that this is what the lease calls for and it was  
10 completely misrepresented to the Court.

11 THE COURT: That's not something I can  
12 consider on a motion to dismiss. I can consider a  
13 lease agreement because it's referenced in the  
14 complaint but in terms of photos, that would not be a  
15 motion to dismiss type -- that's evidence.

16 MR. LICATESI: I don't disagree, Judge,  
17 except that these are pictures of what's in the lease.

18 THE COURT: I know.

19 MR. LICATESI: And it's even further proof  
20 of just the mischaracterization of what's truly going  
21 on there.

22 The problem I have with the case, your  
23 Honor, is that we're not going to try this case. I'll  
24 be here and I will try the case. They're not going to  
25 try the case. The problem is, they use this to hurt

1 those healthcare providers that are out there providing  
2 services to auto accident victims. One out of ten of  
3 the healthcare providers don't accept the no-fault  
4 assignment because they don't know how to navigate the  
5 waters. And when you get into the ocean, they make it  
6 very, very difficult to get paid.

7           Then if you are somewhat successful at it,  
8 like Dr. Zelefsky's Queens practice has 80 people,  
9 they're withholding five million dollars from him and  
10 saying that he's funneling money from lease agreements  
11 that are reasonable, fair-market value and include a  
12 forensic expert who said, this is the fair-market value  
13 for it. They haven't brought anything forward to say  
14 it's not, and their entire complaint is based on that.

15           THE COURT: Okay. All right, thank you.

16           MR. LICATESI: Judge, I know we're not going  
17 to address the motion for the injunction right now, the  
18 preliminary injunction. We'll hear about that after  
19 this?

20           THE COURT: Yes.

21           MR. LICATESI: Okay.

22           MR. KING: Thank you, your Honor. A couple  
23 of I guess preliminary comments to both the arguments.  
24 I'll try to go -- I think I'll go in order. Maybe it's  
25 easier for the Court.

1           With respect to an amendment, we're under no  
2 obligation to request an amendment, although my client  
3 does intend to seek leave to amend in light of newly  
4 developed information and evidence that's come to light  
5 since the filing of the complaint. I think that the  
6 discussion about amendment is premature. Also, I would  
7 note that I think the Court's order that was agreed to  
8 by the parties is that amendments are due by April 14<sup>th</sup>,  
9 so I'll leave that aside.

10           Let me start with the leasing defendants. I  
11 think the Court accurately stated the sort of  
12 procedural posture of the case being a 12(b)(6). The  
13 allegations in the complaint that the four defendants  
14 conspired together to do two things, essentially:  
15 number one, to concoct this medical facility that was  
16 controlled and there was fee splitting. I think that's  
17 the operative term of art in the Eastern District, fee  
18 splitting, with non-licensed professionals.

19           And I think more ink was spilled on this  
20 section of the complaint than the other: That these  
21 four defendants conspired to bilk my client out of  
22 millions of dollars through phony medical testing,  
23 unnecessary medical testing and the like. I would note  
24 I think for the record of this hearing that as we point  
25 out in our papers, there's been not one statement made

1 in defense of any of the defendants that the medical  
2 fraud portion of the complaint should be dismissed.

3 Just as a housekeeping matter, it would seem  
4 to me that if that portion of the complaint exists as  
5 to both sets of defendants, then at this procedural  
6 posture, it would make no sense to dismiss the Malella  
7 or the corporate practice of medicine count.

8 However, as the Court noted at the outset,  
9 given where we are, the allegations that they got  
10 together and put Zelefsky in a position where he's the  
11 sort of face person of this medical entity, and  
12 meanwhile, the person whom Mr. Licatesi refers to as  
13 Doctors Bazakos, which I don't believe they are doctors  
14 or we wouldn't maybe be here, but the Bazakos's would  
15 share in the proceeds of that establishment against New  
16 York law. It's a creature of New York law.

17 Interestingly, I think, and this does touch  
18 a little bit on the issue of the amendment -- as the  
19 Court knows, there's been a stay of party discovery in  
20 this case but third party discovery has been ongoing.  
21 Just on a telephone call the other day with my brothers  
22 here, one of the defense counsel alerted me to the fact  
23 that one of the subpoenas returned that we had issued  
24 to a third party, I think it's American Express, which  
25 showed that New York Rehab had paid American Express

1 accounts to the tune of 2.3 million dollars over the  
2 last seven years, somewhere in the neighborhood of  
3 \$500,000 of which apparently was to the personal Amex  
4 account of one of the non-licensed so-called leasing  
5 defendants.

6 In addition, your Honor -- that's just one  
7 indication of where we see the money being funneled off  
8 now that the subpoena search has started. I think in  
9 addition, as we filed in our -- as an exhibit to the  
10 affidavit in support of the motion for an injunction,  
11 it shows that the woman Bazakos, the leasing defendant  
12 female -- I don't know if it's a wife or a cousin --  
13 held herself out as the healthcare administrator for  
14 New York Rehab. This is not an arms-length operation  
15 at all.

16 Another thing, and this was something that  
17 we've known for some time, and I want to talk about  
18 Corothers in a minute. It's interesting -- I think  
19 there's been an argument advanced by Mr. Licatesi that  
20 the leases are reasonable and if my client is billing  
21 to the tune of some tens of millions of dollars a  
22 month, that's a little bit of money.

23 But it's interesting that when we researched  
24 the defendants, the doctor in this case, the talent if  
25 you will -- and New York wants to make sure that the

1 talent is in control -- resides in a \$600,000 house,  
2 while these poor folks that are the leasing defendants,  
3 they reside in a three-million-dollar house. That's  
4 not in the complaint. It may well be in the amended  
5 complaint.

6 But I think the key here is, what we've  
7 alleged has been sufficient in every case, every  
8 similar case, some of which I've been involved in and  
9 I'll talk about later with respect to the injunctions,  
10 in the Eastern District and the Southern District as  
11 far as I know -- I know of no cases where it's  
12 insufficient.

13 Really, what I think my brothers have here  
14 today, and I think the Court has alluded to this -- it  
15 sounds to me like they have a pretty good counsel who  
16 are going to make an argument that they have good  
17 defenses to the cognizable claims alleged in the  
18 complaint. That remains to be seen. But the arguments  
19 advanced have been factual in nature. So with respect  
20 to the first, the Malella, I think that the rhetoric in  
21 our papers, as the Court says, you're familiar with the  
22 papers and has noted at this stage that stands.

23 Briefly, with respect to the distinctiveness  
24 argument that was sort of tail-ended by Mr. Murray, he  
25 makes two arguments in his papers, I believe. The



1 first one is -- the both non-starters. The first one,  
2 as I think the Court noted -- New York Rehab is listed  
3 as the enterprise, which I believe is in Count 1. I  
4 don't have the complaint in front of me. New York  
5 Rehab isn't identified as a defendant in that count.

6 I haven't seen a case across the country,  
7 where I practice in many jurisdictions, where the isn't  
8 sufficient to achieve distinctiveness. The fact that  
9 we plead in the alternative that in other counts, other  
10 enterprises have been infiltrated, and New York Rehab  
11 was a defendant in those other counts, doesn't negate  
12 the validity and the cognizable -- the fact that Count  
13 1 is cognizable.

14 The second distinctiveness argument I think  
15 is a red herring. I think the argument goes like this:  
16 Allstate says that we're illegally incorporated. So if  
17 we're illegally incorporated, then we are what the  
18 wrongdoing is. But every court that's look at this --  
19 and I think -- I was counsel in the Lyons (ph) case,  
20 which is cited prominently in these briefs. That  
21 argument was discounted because we're talking about  
22 illegally incorporated vis a vis what? One piece of  
23 the medical pie, which is the no-fault realm.

24 It has nothing to do with whether -- if Dr.  
25 Zelefsky wants to share his practice with some folks,

1 the Bazakos's, and they want to treat people with other  
2 insurance or with no insurance, cash payment, of  
3 course, they're allowed to do this. This is a creature  
4 of the Malella case and then the regulations coming out  
5 of that. So both of those distinctiveness arguments  
6 are -- I think they're meritless.

7 On to my brother, Mr. Licatesi. It's funny  
8 because I've never been called Goliath. I think I'm  
9 5'6'' with my heels on, so I take that as a compliment.

10 I would note, just to take these things  
11 seriatim, as they came up in the discussion, it's  
12 interesting to me that first we have sort of a history  
13 lesson of no-fault, which I guess is -- if this was a  
14 congressional hearing, that would have been important.  
15 But it has nothing to do with whether the allegations  
16 are sufficient under 12(b)(6).

17 All the arguments that were advanced on  
18 behalf of Dr. Zelefsky by Mr. Licatesi were factual  
19 arguments. The value of the chairs, the value of the  
20 computer, et cetera. This Court isn't in a position to  
21 even ascertain or to entertain such arguments at this  
22 procedural posture. Certainly after discovery or maybe  
23 even in advance of discovery at a Rule 56 motion, that  
24 would be a different story perhaps.

25 THE COURT: Let me just ask you to address

1 two parts of that, though.

2 MR. KING: Sure.

3 THE COURT: One is this distinction between  
4 what you alleged in the complaint versus what the lease  
5 says. Do you have an explanation for why your  
6 allegations are different than what the lease actually  
7 says?

8 MR. KING: I don't believe that our  
9 allegations are any different.

10 THE COURT: You allege, for example, that  
11 there was one computer. I don't have the lease in  
12 front of me but they're saying there were 20 printers.  
13 You know, you have specific numbers of computers and  
14 printers and their lease has much higher numbers for  
15 those types of items.

16 MR. KING: I have not seen the addendum or  
17 whatever Mr. Licatesi is discussing with respect to  
18 those leasing agreements. So I can't speak to that,  
19 other than to say that the information was provided to  
20 us at some early stage by Mr. Licatesi or by -- I don't  
21 remember, it may have been Mr. Murray because  
22 originally, there was one attorney associated with the  
23 case. I apologize, your Honor, I don't have an answer  
24 for that.

25 THE COURT: What are you saying? I'm

1 talking about the information in the complaint. That  
2 was not based on the lease, that was based on something  
3 else?

4 MR. KING: No, I'm saying that the  
5 information that was supplied -- we're calling them the  
6 leases -- were supplied by one of these attorneys at  
7 some point, and that information is what made its way  
8 into the complaint. In terms of these other -- if Mr.  
9 Licatesi or anyone has additional documents that show  
10 some different number, then I have not seen them.

11 THE COURT: He's saying the leases  
12 themselves show different numbers. Isn't that what  
13 he's saying?

14 MR. LICATESI: He based the complaint on the  
15 lease that's in his possession, that was provided to  
16 him.

17 THE COURT: Which has different numbers.

18 MR. MURRAY: They're also exhibits to the  
19 motion.

20 THE COURT: Right.

21 MR. KING: Annexed, your Honor.

22 THE COURT: That's what I'm confused about.  
23 They're saying -- it's Exhibit 1. I guess A, right?

24 MR. KING: I'm sorry, is this 1 to the  
25 motion to dismiss?

1           THE COURT: The notice of motion, yeah.  
2 They have the rider to the lease agreement that has  
3 particular items and equipment. That's what's  
4 confusing me. If you're saying, we based this one the  
5 leases they gave us, they're saying, these are the  
6 leases and those numbers are completely different than  
7 the complaint.

8           MR. KING: Your Honor, I don't have the -- I  
9 only have their motion papers here. I don't have the  
10 exhibit. As I stand here today, I don't know what the  
11 discrepancy is between the two. I can't advise the  
12 Court.

13           What I would say as a matter of 12(b)(6)  
14 argument, though, is the following: Assuming that the  
15 riders were provided to my team as we put together this  
16 complaint, assuming that that's true, I don't think it  
17 changes the analysis of the Court in terms of, the  
18 pleading is taken in the light most favorable to my  
19 client, and we've stated that those --

20           THE COURT: I know, but if you -- for  
21 example, if your allegation is there's one computer and  
22 they paid \$20,000 a month for one computer --

23           MR. KING: I agree, your Honor. I  
24 understand.

25           THE COURT: -- it's different than when they

1 say that if -- when you're not in that sort of absurd  
2 category of cases where it's sort of plausible -- just  
3 the inference itself makes it plausible because there's  
4 such little equipment on its face.

5 But they're saying if in fact the lease has  
6 all this equipment, then at a minimum, to state a  
7 plausible allegation, you should have someone -- I  
8 guess you should allege that the fair-market value of  
9 that equipment is much -- the fair-market rental, I  
10 guess, of that type of equipment is much less than what  
11 they arranged here. Why shouldn't you at least have to  
12 allege that, as opposed to just saying it's excessive  
13 at the motion to dismiss stage? Do you understand my  
14 question?

15 MR. KING: Well --

16 THE COURT: In other words --

17 MR. KING: I understand your question.  
18 Would it be better --

19 THE COURT: Your interpretation I guess of  
20 Iqbal would be that anyone that has a lease agreement,  
21 if you say they're an undisclosed principal because  
22 those lease agreements are excessive, that that gets  
23 you past the stage -- that's not a very high bar.  
24 Anybody could say that.

25 MR. KING: Right.

1           THE COURT: If you alleged that somehow  
2 there's been an analysis of the value and it's  
3 excessive compared to what the lease says versus that,  
4 that would be more, obviously.

5           MR. KING: Your Honor, I obviously don't  
6 disagree with that. I think it would be better pled if  
7 that were the case, and certainly that will be  
8 something that we'll take the Court's guidance on and  
9 address in the amended complaint.

10           I want to be clear about this. With respect  
11 to the discrepancies in the numbers, I don't want the  
12 Court to take away from this hearing that I or my  
13 partner have tried to mislead the Court. We've already  
14 been called misrepresenters, which I guess is fair,  
15 since we've alleged that their clients are fraudulent  
16 actors.

17           Does the Court -- I only ask this -- I don't  
18 have this rider that Mr. Licatesi is talking about.  
19 Are the numbers in that? Then maybe it would be easier  
20 for me to speak to that.

21           THE COURT: I don't know if the numbers --  
22 it's a long rider. I think they counted them up,  
23 right?

24           MR. LICATESI: Yeah. It's attached to the  
25 lease. It's a schedule attached to the lease.

1 THE COURT: Right, but there's not an actual  
2 number. You have to physically count them, right?

3 MR. LICATESI: Right. They spell it out.  
4 There's like four or five pages of --

5 THE COURT: You want to give that to him so  
6 he can look at it?

7 MR. LICATESI: Schedule 1.

8 THE COURT: Let me just ask you, because  
9 you're talking about amending the complaint. What  
10 would you be amending to add, the thing about the  
11 American Express --

12 MR. KING: I just used the American Express  
13 as an example, which I think is a fairly large example,  
14 because I don't know the last time that the federal  
15 government paid your Honor's American Express or Visa  
16 bill. Certainly, my firm doesn't pay that for me.

17 The whole idea here, your Honor, really is -  
18 - this case law has developed fairly rapidly in the  
19 last say decade really, in the Eastern District and  
20 Southern District. Under the Corothers case, which is  
21 the case -- no one has mentioned it. Malella was sort  
22 of the first. The Corothers case says, look at the  
23 totality of the circumstances.

24 As your Honor pointed out earlier, the fact  
25 that there's profit and loss, that's some indicia of



1 control, some indicia of control. It's a factual  
2 analysis to get to the heart of control oftentimes, and  
3 I think that what we see in the bank accounts bears out  
4 the idea that this wasn't an arms-length agreement  
5 where the talent, i.e. Dr. Zelefsky, hires a couple  
6 folks that have some office equipment, and querying  
7 whether that would be even a smart business move  
8 anyway. Why would you rent at \$25,000 a month a bunch  
9 of computers in this day and age.

10 But be that as it may, maybe they're friends  
11 of yours, you want to help them out. But the fact of  
12 the matter is, this is not a relationship of the doctor  
13 doing his thing and these folks that are just arms-  
14 length. The woman holds herself out as the healthcare  
15 administrator of the medical facility. This is not a  
16 leasing -- this is not a woman in a leasing department.  
17 That will be in our amended complaint.

18 All of the other financial -- what I would  
19 call deceitful financial arrangements which all these  
20 cases boil down to will be in the amended complaint to  
21 show that it's the lease agreements but it's all these  
22 other things, too. It's interesting because Mr. Murray  
23 says that his clients, they provide the medical  
24 equipment, the NCV equipment. And to hear him talk  
25 about this equipment, you'd think this is a hell of a

1 bargain. I want to look at the pictures.

2 But the fact of the matter is, now that  
3 we're getting the subpoenas back, we see tens of  
4 thousands and hundreds of thousands of dollars going  
5 out the door from New York Rehab to who? Medical  
6 leasing companies for electrodiagnostic testing  
7 equipment, which is the NCV/EMG testing equipment.  
8 Query why New York Rehab would have to expend all this  
9 money, significant money on that, if they were actually  
10 being provided by these folks.

11 I think that these cases really -- it's like  
12 peeling back to the onion. At this stage, we've  
13 established a cognizable claim vis a vis the Malella  
14 claims. I don't think your Honor wants to hear  
15 anything about the medical fraud claims. I'm happy to  
16 talk about those but it doesn't seem like there's much  
17 in the way of a defense there, so I won't take up any  
18 more of the Court's time, other than to say we've  
19 clearly alleged that the four defendants conspired to  
20 produce what? Medical invoices which misrepresented  
21 the legitimacy of the entity, i.e. Malella and sought  
22 payment on bogus medical treatment.

23 Of course we say that because we think  
24 Bazakos is really in control, right? They're the ones  
25 living in the three-million-dollar house. So my

1 amendment would go to -- as your Honor said, it would  
2 be helpful to have an analysis done of what the real  
3 value of the equipment in this rider is in the  
4 marketplace. I suppose -- I'm not stupid, I will  
5 provide it.

6 But it will also strengthen, I think, and  
7 further enlighten this Court to the fact that the money  
8 that was being paid in by the insurance companies, by  
9 my client and other insurance companies was being sent  
10 back out of the New York Rehab bank accounts to other  
11 people that you have to question why that would be,  
12 including, I think as Mr. Murray told me on the phone  
13 the other day, the personal American Express account of  
14 Ms. Bazakos.

15 THE COURT: Okay. Do you want to address  
16 the injunction issue now?

17 MR. KING: Sure.

18 MR. LICATESI: Your Honor, before we get to  
19 that, could I just reply to a couple of those  
20 statements that were made?

21 THE COURT: I was going to let you then  
22 reply and then address the injunction issue at the same  
23 time.

24 MR. LICATESI: Okay.

25 THE COURT: Okay?

1 MR. LICATESI: Thank you, Judge.

2 THE COURT: Go ahead.

3 MR. KING: Thank you, your Honor.

4 This request for an injunction is really on  
5 all fours with a similar request that was made to this  
6 Court last year in a case that I was co-counsel on, the  
7 Elsinati (ph) case, which is prominently cited and  
8 discussed in our papers as well as opposition papers.  
9 The facts in that case are substantially similar.

10 Although that case had been pending for some  
11 additional period of time, much of that time, there had  
12 been no activity in the case, and my client moved to  
13 have a standstill, if you will, with respect to the  
14 arbitration, for the exact same reason that we're  
15 asking for it in this case, which is it costs my client  
16 money in terms of -- well, if it loses at arbitration,  
17 it costs it money just in terms of transactional costs  
18 every day, every time it gets in arbitration, as I  
19 think most insurance companies in New York with respect  
20 to say no-fault litigation and no-fault arbitration,  
21 most of these companies pay their law firms that handle  
22 that.

23 THE COURT: I know but money -- as you know,  
24 money is usually not a reason to grant an injunction.  
25 If there's money damages, that can usually be handled

1 through a lawsuit, right?

2 MR. KING: That's the standard. We're  
3 knocking down the steeple, I agree with you, your  
4 Honor. But I think that the fact of the matter is, we  
5 have a case here where it's hard to unravel not just  
6 the money but the risk of inconsistent decisions in  
7 these arbitration forums -- I don't know how familiar  
8 your Honor is with the arbitration of no-fault, that  
9 whole -- it's almost a cottage industry in New York.  
10 But it's not the same as like a mini-trial arbitration.  
11 Most of these arbitrations are conducted often times on  
12 the phone. There's no real rules of evidence, et  
13 cetera.

14 As Michael Flaherty, who is the person at  
15 Allstate who is the affiant in this case, says in this  
16 affidavit, inconsistent results are the norm. And I  
17 think for that reason, Judge Spatt in the Elsinati case  
18 -- again, I don't think there's anything meaningful or  
19 dispositively meaningful difference between that case  
20 and this case. What my brothers argue here is that the  
21 Supreme Court has said the FAA is sort of supreme and  
22 we're not going to take away anyone's right to  
23 arbitrate.

24 But as Judge Spatt said, it's not -- we're  
25 not extinguishing the right, we're simply delaying it

1 in the interest of all parties. I think that the  
2 irreparable harm here is the open question, if you  
3 will, your Honor. I'm not completely set on it one way  
4 or the other. But the open question of what  
5 inconsistent results could mean vis a vis estoppel  
6 issues, et cetera in the case in this Court.

7           There is no question, as there was no  
8 question in Elsinati, that resolution of the issues in  
9 this case will likely obviate the need for any  
10 arbitration to be conducted at all. In fact, let's say  
11 that my client loses this case and it just gets tossed  
12 out on its ear. My client is not going to go through  
13 an arbitration, right?

14           Similarly, if there is a decision made that  
15 this is not an entity entitled to take under the no-  
16 fault regulatory scheme here in New York, then there's  
17 not going to be a basis to arbitrate. I guess there  
18 could still be arguably a basis to arbitrate if there's  
19 a finding in this case that there's been medical fraud  
20 and maybe there's some other non-overlapping cases in  
21 arbitration. But so your Honor knows, I'm not aware  
22 that any of the cases in arbitration presently, which  
23 is 35, which is different than when we filed our papers  
24 -- those 35 cases are all subsumed in the case at bar.

25           THE COURT: You said they are?

1 MR. KING: They are.

2 THE COURT: What other courts have you  
3 sought -- I know Judge Spatt granted the injunction but  
4 have there been other courts that have denied it?

5 MR. KING: No, your Honor. That was the  
6 first time I've done that in the Eastern District.  
7 I've only been practicing in the Eastern District since  
8 2007. That was the first time that one of these had  
9 been up there.

10 I would say, your Honor, I'm familiar with  
11 the arbitration and compelling of arbitration  
12 arguments. There's a case in the Eastern District out  
13 of Brooklyn. It's the Lyons case that's been cited a  
14 couple of times. That was Judge Gleeson in that case.  
15 I'm counsel of record in that case. Clearly, in that  
16 case, the issue was, can the defendants compel  
17 arbitration. The judge found in that case -- held that  
18 they absolutely did have a right to compel sort of  
19 prospective arbitration.

20 That's not what we're talking about here.  
21 That's not the same footing or procedural posture where  
22 we are here. There's no other case -- I guess this is  
23 the best way to look at it: I agree with your Honor,  
24 the notion that if you're really talking about money  
25 damages, well, you can always be satisfied at some

1 point. I think it's the inconsistent judgment.

2 And I think if you look closely at what  
3 Judge Spatt reasoned in that case, that's the only case  
4 that I'm aware of -- and I haven't seen one cited by my  
5 brothers -- that comes close on the factual scenario in  
6 the Eastern District or in the Second Circuit, with  
7 respect to this issue. So I guess it was a very novel  
8 issue at that time and I'm not aware of any case  
9 where --

10 THE COURT: They cite this GEICO v. Grand  
11 Medical Supply case in the Eastern District on page 8  
12 of their opposition.

13 MR. KING: I think that's the same -- your  
14 Honor, with all due respect, that's essentially what I  
15 was talking about with the Lyons case because in the  
16 GEICO/Grand case, the question was whether or not there  
17 could be -- arbitration could be compelled. The court  
18 said, I can't stand in the way of a right of a party to  
19 compel. The Supreme Court says that the FAA is  
20 controlling. There's a lot of discretion in that  
21 regard, et cetera.

22 But that's not what this case is about.  
23 That's like Lyons. This case here today, your Honor,  
24 this New York Rehab case is like Elsinati. Judge Spatt  
25 in Elsinati said the following: "While the granting of



1 a motion to compel means the parties are obligated to  
2 arbitrate," -- which we don't disagree with, your  
3 Honor. We're obligated to arbitrate -- "the court sees  
4 no reasons why the right to an arbitration forum means  
5 that this right must be immediate. The contractual  
6 agreement to arbitrate can be fulfilled even if it is  
7 deferred in light of the issuance of a temporary stay.  
8 In other words, if an injunction is not permanent, then  
9 it will not eviscerate one's right to compel."

10 That's this case. I'm not trying to claim  
11 ownership of that other case. I happened to be counsel  
12 in that case. There's no difference. It was a case  
13 where Allstate brought a Malella and medical fraud case  
14 under the federal racketeering statute against a group  
15 of clinics --

16 THE COURT: I understand it's similar but I  
17 have real reservations about -- just because it delays,  
18 that doesn't mean it's inconsistent with the whole  
19 purpose of arbitration. The whole purpose of  
20 arbitration is to be efficient, not to have a long  
21 delay before the arbitration can go forward. So I'm  
22 not sure I agree with -- we're weighing a lot of  
23 different factors here and that one certainly concerns  
24 me, given the whole purpose of arbitration to begin  
25 with.

1 MR. KING: If I may, your Honor.

2 THE COURT: Sure.

3 MR. KING: I understand that that is one of  
4 the primary concerns about arbitration; it's quick,  
5 it's --

6 THE COURT: There's two concerns. One is,  
7 we're really just talking about -- we're talking about  
8 money. And then you're pointing out I guess there can  
9 be inconsistencies that are generated. But that has to  
10 be balanced against the whole purpose of arbitration.  
11 You have defenses in each of those arbitrations in  
12 terms of fraud, right? They're all available to you in  
13 each of those.

14 MR. KING: They are, but at the same time,  
15 your Honor, with all respect to the arbitration forums,  
16 you can't walk into an arbitration that's going to be  
17 conducted twenty minutes on the phone and say, we've  
18 got all this evidence and we're going to put on a  
19 federal RICO case.

20 I think the interests of efficiency and the  
21 fact that the Supreme Court and the Lyons court --  
22 Judge Gleeson found, you can compel this arbitration.  
23 But there's no -- I don't see anywhere even in dicta  
24 where it says that arbitration has to be -- it's a  
25 constitutional right to a speedy jury trial. I don't

1 think that that's the case.

2 I think as Judge Spatt noted, the Second  
3 Circuit has carved out that there may be exceptions to  
4 this. Which would seem to me to be an exception  
5 because both parties are expending resources on a  
6 collateral sort of quasi-judicial litigation of these  
7 underlying claims, when the same thing is going to be  
8 done in here.

9 I just don't -- forget the money aspect of  
10 it. I think that the inconsistent results is a  
11 problem. And I agree with you, it is a balancing of  
12 the equities, but I think the balancing of the equities  
13 weights in favor of A) not having everybody spend a lot  
14 of time and money on those other issues, which won't be  
15 consequential in this case, and more importantly, the  
16 time spend in this case, in this Court, will be  
17 consequential and dispositive of those claims one way  
18 or the other, whether it's beforehand or afer.

19 THE COURT: But if I were to grant that,  
20 Allstate would have the ability to not pay anything out  
21 and they would have no recourse. They couldn't  
22 arbitrate it, right? What recourse would they have?

23 MR. KING: They can counterclaim. I mean,  
24 they can counterclaim in this Court, right?

25 THE COURT: Yeah, okay. Let me hear from

1     them, okay? Thank you.

2                 MR. KING: Sure, thank you.

3                 MR. MURRAY: This is a 12(b)(6) motion  
4 addressed to the complaint that we have in front of us.  
5 The complaint that we have in front of us -- the only  
6 allegations -- I don't want to be repetitive -- is that  
7 they entered into these two leases and the rental  
8 payments were "excessive." That's it. That's all they  
9 have with regard to the Monell claim.

10                They now come up here and make statements  
11 about the values of our houses, which I have no idea  
12 what he's talking about, talking about the payment of  
13 an American Express bill, which I don't have any  
14 information about, talking about --

15                THE COURT: What do you mean, you don't have  
16 information about it? He's claiming you gave him the  
17 information.

18                MR. MURRAY: No. All I know -- we had a  
19 conversation the other day where I got, why do you need  
20 the personal American Express of my client? He says,  
21 we have information that they're paying something. So  
22 I didn't give him any information. This was brought up  
23 for the first time Thursday or Friday of last week. I  
24 think it's an acknowledgment that their complaint as  
25 pled is deficient.

1           THE COURT: I don't know about that. The  
2 bottom line is, and you can look at all my decisions,  
3 every single one, and it's consistent with the Second  
4 Circuit's instruction that if it's a pleading defect  
5 for conclusory allegations, then they should be given a  
6 chance to amend. So whether or not the complaint is or  
7 is not sufficient at this point, if they say they have  
8 additional details, there's no basis for me saying I  
9 shouldn't allow them to do that.

10           MR. MURRAY: I understand that. I  
11 understand that. And then I would have a chance with  
12 the pled complaint to address it and maybe or maybe not  
13 make a motion to dismiss with regard to the amended  
14 complaint. But all I have is the complaint that's  
15 here. This is the first time they've mentioned that  
16 they want to amend the complaint.

17           I've made a motion to dismiss with regard to  
18 the allegations in this complaint. The allegations in  
19 this complaint are completely devoid of any facts which  
20 would establish of my client. The only allegations  
21 are, they misquote the content of two leases and say  
22 the payments are excessive. That's it. If they want  
23 to have it dismissed with leave to replead and replead  
24 their facts to bolster their claim so I have an  
25 opportunity to review that with my client and to

1 address it in an appropriate manner, I would do that.  
2 But what I have now -- all I can argue is what I have  
3 and what they've pled.

4           They're pleading was just -- slap something  
5 together, serve it on us, drag us in and go through  
6 this motion. They could have amended the complaint  
7 prior to us making a motion. I've seen that happen in  
8 the courts, where they say --

9           THE COURT: But as you can see, their  
10 argument is that they're getting information -- since  
11 they filed this complaint, that they have additional  
12 information.

13           MR. MURRAY: Then plead it and then I can  
14 address it. I can't be ambushed during a hearing.

15           THE COURT: I understand that. I understand  
16 that.

17           MR. MURRAY: And making statements that I  
18 have no idea whether they're true or not true or what  
19 the basis of it is. So I think looking at this  
20 complaint, looking at the allegations of this  
21 complaint, they're deficient as to the leasing  
22 defendants. They do not plead a plausible RICO claim  
23 against my defendants based on two leases that they  
24 misquote, and they made a conclusory statement that the  
25 payments are excessive. That's it. The only

1 paragraphs dealing with my client are 57 to 73. Those  
2 are the only ones that have any facts whatsoever with  
3 regard to my clients. That's it.

4 He also makes the statement that we've pled  
5 that they've conspired, all the defendants have  
6 conspired. They haven't pled anything for conspiracy.  
7 There's not an allegation of a meeting, there's no  
8 allegations of an agreement. There's no allegations of  
9 communications. They have an obligation under Iqbal to  
10 set forth facts in a complaint that we can address, and  
11 they haven't done that.

12 Everything that they're throwing up now at  
13 the last minute is not properly before the Court and if  
14 the Court grants them leave to replead, they can  
15 replead and we can address it at that time.

16 THE COURT: Okay.

17 MR. MURRAY: With regard to the injunction,  
18 funny, they rely on Judge Spatt's determination in  
19 Elsinati. Judge Spatt also said in that case, "It is  
20 no doubt unwise for a court to simply step in and stay  
21 a contractually deserved arbitration merely because the  
22 court sees potentially more efficient use of time and  
23 resources by litigants, arbitrators and judges."

24 He then goes on to actually grant a  
25 temporary stay of it because the defendants in that

1 case had asserted counterclaims for the same claims  
2 that were going into arbitration. There's been no  
3 counterclaims asserted in this case for those claims  
4 that are before arbitrations. There's no counterclaims  
5 at all at this point in this proceeding.

6 Second of all, there is the Federal  
7 Arbitration Act, which the court -- both the Second  
8 Circuit and the Eastern District in Grand Medical said,  
9 you can't stay arbitrations that are contractually  
10 bound under the Federal Arbitration Act. Regardless of  
11 the fact if there's issues with regard to res judicata  
12 or collateral estoppel and the effect on other  
13 litigation in federal court, they will have to be  
14 addressed.

15 But you can't sit there and deny a person,  
16 as the court indicated, that we have a contractual  
17 right spelled out in the statute, New York Rehab, to  
18 pursue the claims in a timely manner. They have not  
19 alleged any irreparable harm or any 36-billion-dollar  
20 company -- that 70 claims of \$1,000 is somehow going to  
21 put them out of business. So I don't think they've  
22 come even close to alleging any of the elements of an  
23 injunction.

24 THE COURT: Okay.

25 MR. LICATESI: I was kind of scratching my



1 head, how they know exactly where my client lives,  
2 which is in Monsey. He's a religious Jew. And they  
3 know where codefendants live, on the North Shore of  
4 Long Island. But they didn't have the lease agreement  
5 or the knowledge of the contents of that lease  
6 agreement in court today on a motion to dismiss, which  
7 they base their pleading, which has turned my client's  
8 life upside down.

9           They want to take that noose and make it  
10 tighter by asking this Court to deprive my client his  
11 right to go into an arbitration proceeding and rectify  
12 the wrongful conduct of Allstate in a proceeding that's  
13 the most efficient, expeditious and most qualified  
14 forum for that particular claim. I'll share with the  
15 arbitrators next time I see them what Smith & Brink  
16 thinks, but the problem here is that once again,  
17 they've mischaracterized the whole process.

18           You see, I teach the CLE courses on no-fault  
19 regulations. I attend those arbitrations regularly.  
20 And 98% to 99% of them are in person, and we do argue  
21 exactly what Smith & Brink has once again  
22 misrepresented to this Court, that we haven't addressed  
23 the no-fault scheduling of the bills, the mail fraud  
24 they're alleging, the medically unnecessary services.  
25 I argued ten of those cases this week and it's the

1 arbitrator that decides the medical necessity.

2           The allegations contained in that complaint,  
3 your Honor, that say an EMG should be done maybe not  
4 bilaterally, maybe you should do four nerves and two  
5 motors. Those are arguments that are made 100 times a  
6 day before about 150 arbitrators. Most of those  
7 decisions are pretty consistent, and they're not done  
8 on the telephone.

9           Malella allegations are addressed routinely  
10 for demands for examinations under oath of healthcare  
11 providers, and they're done by the experts in this  
12 field, which really are those arbitrators. That's why  
13 the system was put in place.

14           In one breath -- and this is an important  
15 point, your Honor, and I didn't make it previously.  
16 They say that each claim should be addressed  
17 individually. That's what they're contractually  
18 obligated to do through their insurance agreements.  
19 That's what the law says that they have to do. But  
20 then they want to lump all those claims together and  
21 have this Court address them, which is patently  
22 improper. They're attempting to disguise the issue of  
23 medical necessity and fee scheduling as a RICO case,  
24 and it's not. And we address that issue, although they  
25 feel that we didn't address it.

1           Most disturbing to me, your Honor, is the  
2 subpoenas. Last month, we were asked if we would  
3 consent to an adjournment of this oral argument, and I  
4 was misled. I was told that there were scheduling  
5 problems and they just couldn't be here, and would I  
6 consent to it? As a professional courtesy, because  
7 I've never said no in 27 years -- what happened in the  
8 last three to four weeks was the filing of all these  
9 subpoenas.

10           We immediately made a motion to quash and  
11 the magistrate said, listen, you have to have a meet  
12 and confer on this. And when we tried to do that --  
13 and I can show you the e-mails -- we were rebuffed and  
14 we were told why, these issues can't be resolved. We  
15 said, well, we have to do that because we need to make  
16 this motion to quash.

17           We sent letters out to those parties and  
18 said to them, we're litigating this issue, we have a  
19 motion to quash, please don't comply. And what they  
20 did during that time was, they continued to harass  
21 those subpoenaed parties and did end up getting some of  
22 those records, so that they could come here today and  
23 try to impress this Court with facts that are not in  
24 the pleadings and which are completely irrelevant, and  
25 even if they replead this pleading, we're going to show

1 that they're just going on a fishing expedition and  
2 taking facts and trying to contort them, just like they  
3 did with the lease agreements.

4 THE COURT: I don't understand. I agree  
5 with Mr. Murray. I'm not going to decide that issue  
6 now. But certainly, if they were to add all these  
7 other facts, it would be a totally different ball game.  
8 That one of the leasing defendants is representing  
9 herself as the healthcare administrator, that \$500,000  
10 went from New York Rehab to them through Amex. Those  
11 are significant allegations. Those aren't like minor  
12 tweaking of the -- those are significant allegations,  
13 right?

14 MR. LICATESI: Your Honor, I couldn't  
15 disagree with that but --

16 THE COURT: Okay, so when you say, we're  
17 going to shoot those down, I don't --

18 MR. LICATESI: I couldn't put those in my  
19 motion to dismiss because they're not before us.

20 THE COURT: I understand but if they allege  
21 those things, you say, I'm going to shoot them down.  
22 But, again, it's a motion to dismiss. Even if you  
23 believe that they're wrong, if they allege those types  
24 of things, those are serious, non-conclusory  
25 allegations with respect to the relationship between

1 the defendants and the entity.

2 MR. LICATESI: Judge, there's a New York  
3 State PJI charge that says that when somebody  
4 misrepresents one thing, you can disregard the totality  
5 of what they're representing. So far today, we've  
6 shown their misrepresentations in terms of what they  
7 brought to this Court, and we'll continue to point that  
8 out to the Court. Under the 12(b) motion to dismiss,  
9 we wanted to point out the misrepresentations.

10 With respect to Pacific Indemnity, your  
11 Honor, they do have to make a showing of that  
12 irreparable harm. This is a company, an entity that in  
13 2009 had a 32-billion-dollar revenue and over the last  
14 four quarters, over 34 billion dollars in revenue. Do  
15 we think that the payment of certain claims right now  
16 that average less than \$1,000 are going to cause  
17 Allstate irreparable harm, or would they hurt the  
18 healthcare practitioner who is struggling to make a  
19 living? That's the question I leave you with, Judge.

20 THE COURT: Okay, thank you.

21 First of all, I'm going to rule on the  
22 preliminary injunction motion on the record now. I'm  
23 going to deny that motion. The standard for  
24 preliminary injunction is well-settled. The movant  
25 must demonstrate, one, irreparable harm absent

1 injunctive relief, and two, either a likelihood of  
2 success on the merits or a serious question going to  
3 the merits to make them a fair ground for trial, with  
4 the balance of hardships to be decidedly in the  
5 plaintiffs' favor.

6           The irreparable harm requirement is not met  
7 in this case. We are dealing with money damages. All  
8 the things that we've discussed that are in the  
9 complaint can all be compensated through money damages.  
10 To the extent that the irreparable harm articulated is  
11 inconsistent -- potential inconsistent results in  
12 various arbitration proceedings, I do not believe under  
13 the circumstances of this case that that possibility is  
14 sufficient to constitute irreparable harm in terms of  
15 the issuance of an injunction.

16           In terms of likelihood of success on the  
17 merits, I don't believe I have sufficient basis to  
18 conclude that requirement at this point. And as to the  
19 issue of serious questions going to the merits to make  
20 them a fair ground for trial, assuming that is  
21 satisfied here, the balance of hardships I do not think  
22 tips decidedly in the plaintiffs' favor, again, when  
23 you balance the inconsistent results versus the purpose  
24 of arbitration, the contractually agreed-upon  
25 arbitration and the substantial delay that would ensue

1 in that arbitration if the Court were to issue this  
2 injunction. So under the circumstances of this case,  
3 I'm denying the injunction.

4 With respect to the motion to dismiss, the  
5 Court in its discretion does not have to decide a  
6 pending motion to dismiss before giving leave to amend.  
7 A request has been made to amend. As I said, if I were  
8 to dismiss the complaint, as a matter of course, I  
9 would give them an opportunity to replead. But there's  
10 no requirement that I go through that exercise of  
11 analyzing a complaint that they've already decided --  
12 they've already told me that they have additional facts  
13 that can make some of the issues that we talk about  
14 academic in terms of conclusory allegations and things  
15 like that.

16 So in my discretion, I'm going to allow them  
17 to amend the complaint before I decide and to save  
18 costs to the defendants -- I don't want you to have to  
19 put in whole new sets of briefs. So if you believe,  
20 which I assume you'll continue to believe that the  
21 complaint is defective, you can just put in -- we'll  
22 set dates but you can just put in a letter saying, we  
23 renew our motion, and then just in the letter -- you  
24 don't have to go through all the law again. You can  
25 just state why whatever additional allegations they put

1 in you believe still or conclusory or insufficient in  
2 some way. Then I'll consider your prior briefs in  
3 conjunction with those letters. I won't have oral  
4 argument again unless I have any questions based upon  
5 the letters that were filed, okay?

6 MR. KING: Your Honor?

7 THE COURT: Yes.

8 MR. KING: There has been an issue with  
9 regard to discovery and the magistrate had basically  
10 pushed back our obligation to respond to discovery  
11 until after today's date.

12 THE COURT: Okay.

13 MR. KING: Is this an issue that we should  
14 address with the magistrate now, whether or not --

15 THE COURT: Yeah, you can address it with  
16 the magistrate but I want you to know -- we'll set some  
17 dates. I don't intend this to be like thirty/thirty.  
18 I expect weeks we're talking about, and my expectation  
19 would be to decide this very quickly once I get those  
20 supplemental -- once I get the amended complaint and  
21 the letters, my intention would be to decide it within  
22 two weeks of that date, so that the parties can figure  
23 out what to do, okay?

24 MR. KING: Okay, thank you.

25 MR. LICATESI: Your Honor, what about the



1 motion to quash the subpoenas?

2 THE COURT: You've got to address that to  
3 the magistrate judge. I thought Mr. Murray told me  
4 that that was being held in abeyance pending this,  
5 right?

6 MR. MURRAY: The discovery, but we'll  
7 address it with the magistrate.

8 THE COURT: I'm not going to get involved in  
9 that.

10 MR. LICATESI: I understand that, your  
11 Honor, but they're busy calling up these subpoenaed  
12 parties and trying to get records before we even go  
13 before the magistrate, because we just conferred and  
14 while we're conferring, they're doing things behind our  
15 -- it's not a level playing field.

16 MR. KING: Your Honor, may I just -- it's  
17 rare that I'm in federal court and someone I've never  
18 met calls me a misrepresenter time and time again. I  
19 guess it's going to be personal. Your Honor, it is a  
20 matter for the magistrate.

21 The fact of the matter is, the reason that  
22 these guys' motion to quash didn't get before the  
23 magistrate is because -- he's been before the  
24 magistrate in this case, I hadn't been. My associate  
25 was. He didn't follow her rules. That's the only

1 reason the motion to quash didn't happen.

2           When I spoke to these two fellows two weeks  
3 ago, I told them as a matter of good faith, if you want  
4 to bring it up to the judge, I would agree to have the  
5 oral argument there. I don't even need your papers.  
6 We'll argue the issues. They still haven't filed the  
7 papers. So this sort of vitriol about Allstate and how  
8 much money it makes every year, it's irrelevant and  
9 it's offensive.

10           THE COURT: Okay. I don't want to get  
11 involved in that. You can --

12           MR. KING: My only question is, can we have  
13 thirty days to file our papers?

14           THE COURT: Thirty days? That's a long  
15 time.

16           MR. KING: Twenty days?

17           THE COURT: Twenty days. I was thinking  
18 more along twenty days, okay?

19           MR. KING: Thank you.

20           THE COURT: Say April 22<sup>nd</sup>. Then how long do  
21 you want to put in your letter renewing --

22           MR. MURRAY: The only problem is I'm going  
23 to be away the first week of May, so if I could have  
24 twenty days.

25           THE COURT: That's fine, May 12<sup>th</sup>, okay?

1 I'll give you until May 30<sup>th</sup> then to oppose  
2 that.

3 MR. KING: Sure.

4 THE COURT: Then the reply by June 9<sup>th</sup>.  
5 Again, don't rehash all the other arguments. This is  
6 just on this issue of the specificity as it relates to  
7 the principals and whether or not -- the ownership  
8 issue, okay? And I won't have oral argument. My  
9 intention would be either to issue an oral ruling or a  
10 written ruling before June 30<sup>th</sup>, okay?

11 MR. MURRAY: Excellent. Thank you, your  
12 Honor.

13 THE COURT: Okay, thank you. Have a good  
14 night.

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18 I certify that the foregoing is a correct  
19 transcript from the electronic sound recording of the  
20 proceedings in the above-entitled matter.  
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25 ELIZABETH BARRON

April 11, 2014